FILE COPY

JAN 7 1935

CHARLES ELMORE CROPLEY

No. 531

Supreme Court of the United States

OCTOBER TERM, 1934

F. EUGENE NORTZ

vs.

THE UNITED STATES

PLAINTIFF'S REPLY BRIEF

OTTO C. SOMMERICH,
Solicitor for Plaintiff.

MAXWELL C. KATZ,
OTTO C. SOMMERICH,
RAYMOND T. HEILPERN,
of Counsel.

INDEX TO CASES CITED

PAGE

New River Collieries Co. v. United States, 262 U. S. 341, 43 S. Ct. 565 8

Olson v. United States, 292 U. S. 246, 54 S. Ct. 704, 709 8

Prendergast v. New York Telephone Co., 262 U. S. 43, 47, 43 S. Ct. 466 2

INDEX TO STATUTES CITED

Emergency Banking Act of March 9, 1933 7

the Government—whether plaintiff received just compensation for his $106,300 of gold certificates, when he was paid and received under protest $106,300 of lawful currency not redeemable in gold.[1]

The petition herein alleged that, on January 17, 1934, the date of plaintiff's tender, and for some time prior and subsequent thereto, an ounce of gold was of the value of at least $33.43 (R. 2). A statement in a pleading as to the value of an article is a statement of fact (*Prendergast* v. *New York Telephone Co.*, 262 U. S. 43, 47, 43 S. Ct. 466).

---

[1] In attempting to reply to the argument, advanced in the brief of Grandin Tracy Vought as *amicus curiae*, that gold certificates are warehouse receipts issued by the Government, defendant omits a material portion of the debate in the House of Representatives on the Act of March 3, 1863. A portion of the debate which follows immediately after that quoted in defendant's brief is significant:

> "MR. PENDLETON. Suppose a man takes $100 in gold and deposits it in the Treasury, there is authority here for the Secretary of the Treasury to issue a certificate for $120.
>
> MR. HOOPER. Oh, no; there is authority for the Secretary to issue a certificate for $100, the amount deposited. If ten dollars of interest becomes due, of course the individual could demand that interest in gold; but instead of handing over that gold and receiving it immediately back again, the Secretary may issue a certificate for ten dollars.
>
> MR. PENDLETON. I submit that the amendment does not carry out the idea the gentleman has just stated. The amendment says that the certificates which are issued in payment of the public debt, and are represented by eighty per cent. of their amount in coin in the Treasury, shall, together with the certificates given for gold and bullion deposited, not exceed, at any time, twenty per cent. of the coin and bullion in the Treasury.
>
> If I comprehend correctly the amendment offered by my colleague from Ohio, it does not carry out the idea which the gentleman from Massachusetts has just stated, and which, I presume, was intended to be incorporated in it.
>
> But I am opposed to the whole scheme; and I do not think it legitimately belongs to this bill. I can see no good reason

Therefore, by demurring to the petition herein, the Government has conceded the value of gold as stated therein (R. 3).

Irrespective of this technical position, however, we submit that the truth of the statement contained in the petition is fully substantiated by reference to the records of contemporaneous gold transactions.

---

why the Treasury of the United States should become the depository of the gold belonging to private individuals of this country, and the Government take upon itself the care and custody thereof, while they put out these certificates certifying that it is in the Treasury. Why is it necessary to withdraw that gold and silver from circulation, deposit it in your Treasury, and have it represented by these notes? If that system is to be fairly carried out as prescribed in this amendment, the money will remain in the place of deposit until these certificates shall come home for redemption. That will not increase in any wise the revenues of the Government. It gives no advantage to the Government. The Government receives nothing for the responsibility, the care and the trouble of the custody of this money.

I submit, therefore, that the whole amendment, being founded upon a proposition to do that which there is no necessity of doing, and for the doing of which no benefit accrues to the Government, and the doing of which imposes great expense and trouble on the Government, ought to be rejected."

It is thus apparent, as indicated by the remarks made by the Congressmen at the time, that the purpose of the Act was to empower the Government to serve as custodian of gold and gold coin *belonging* to the depositor, for which the United States was to issue receipts in the form of gold certificates.

The provision authorizing the issuance of certificates for interest for an additional 20% in no wise affects the conclusion. Neither the Act nor the debate justifies a claim that these additional certificates were to be gold certificates redeemable out of the coin or bullion placed in safe-keeping with the United States. The obvious intent of the clause was to use the gold thus deposited as a yardstick to measure the amount of interest certificates that the Secretary of the Treasury might issue.

In his radio address from the White House on October 22, 1933, President Roosevelt announced:

> "As a further effective means to this end, I am going to establish a Government market for gold in the United States. Therefore, under the clearly defined authority of existing law, I am authorizing the Reconstruction Finance Corporation to buy gold newly mined in the United States at prices to be determined from time to time after consultation with the Secretary of the Treasury and the President. *Whenever necessary to the end in view, we shall also buy or sell gold in the world market.*" (italics ours)

In October 1933, pursuant to this announced policy, the United States Government purchased gold, both here and abroad, its purchases here, however, being confined to gold newly mined in the United States. Said purchases, beginning on October 25th, were made by the Reconstruction Finance Corporation, and later by the New York Federal Reserve Bank, at prices ranging between $33.36 per ounce on October 25, 1933 and $34.45 per ounce on January 19, 1934. The price paid by the United States Government for such gold on

---

Regardless of whether or not this interpretation is correct, the Act of March 14, 1900 as amended (the Act under which the certificates in question were issued) superseded the Act of March 3, 1863, and provided in part:

> "* * * and the coin so deposited shall be retained in the Treasury and held for the payment of such certificates on demand, and used for no other purpose."

Furthermore, the footnote on page 7 of the Government's brief illustrates that gold certificates are considered as equivalent to gold itself for either may be held as reserve against the issuance of Federal Reserve Notes.

January 17, 1934, the date of plaintiff's tender, was $34.45.[2]

Despite these indisputable facts, the Government contends in this Court that, at the time in question, there was no market for any gold other than newly mined gold or gold held for commodity purposes under a license issued by the Secretary of the Treasury.

---

[2] The above statements are based upon the reports contained in the "Financial Chronicle."

According to the same publication, the London open market gold price during the period in question was generally slightly below the price bid by the above-mentioned agencies of the Government. On January 17, 1934, said London open market gold price was 131s. 6d., or $33.43 per ounce.

A statement of the London open market gold price and the price paid for gold by the United States during the period from December 20, 1933 to January 26, 1934, is set forth below. Said table conclusively establishes the truth of the allegation of value contained in the petition:

Date		London Open Market Gold Price	Price Paid for Gold by U. S. (Reconstruction Finance Corp.)
1933			
Wed., Dec.	20	126s. 9d.	$34.06
	21	126s. 2d.	34.06
	22	126s. 3d.	34.06
Sat.	23	126s. 5d.	34.06
	25 & 26	Holiday ..... Dec. 26	34.06
	27	126s. 5d.	34.06
	28	126s. 3d.	34.06
	29	126s. 2d.	34.06
	30	126s. d.	34.06
1934			
Mon., Jan.	1	Holiday	
	2	127s.	34.06
	3	127s. 6d.	34.06
	4	127s. 6d.	34.06
	5	127s. 6d.	34.06

Gold has an intrinsic value and is bought and sold in the world markets.[3]

Since gold has this intrinsic value, it is patently absurd to contend that gold in London or any other place outside of the United States and newly mined gold has a value in excess of $30.00 per ounce and that gold in this country held by residents thereof is worth no more than $20.67 per ounce. Neither Legislative nor Executive fiat can accomplish such a feat.

Gold is gold, whether newly mined or centuries old. Gold in New York, disregarding the cost of transporta-

Date		London Open Market Gold Price	Price Paid for Gold by U. S. (Reconstruction Finance Corp.)
1934			
	Jan. 6	126s. 11d.	34.06
Mon.	8	126s. 8d.	34.06
	9	126s. 8½d.	34.06
	10	127s. 1d.	34.06
	11	127s. 1d.	34.06
	12	127s. 2d.	34.06
	13	127s. 2d.	34.06
Mon.	15	128s. 6d.	34.06
Tues.	16	131s. 9d.	34.45†
	17	131s. 6d.	34.45
	18	132s. 10d.	34.45
Fri.	19	132s. 10d.	34.45
	20	132s. 9d.	34.45
Mon.	22	132s. 11d.	34.45
	23	132s. 9d.	34.45
	24	132s. 10d.	34.45
	25	132s. 1d.	34.45
	26	132s. 8d.	34.45

[3] This is evidenced by the price quotations from the "Financial Chronicle" set forth at pp. 5, 6.

† N. Y. Federal Reserve Bank superseded the R. F. C. beginning with Tuesday, Jan. 16, 1934.

tion, is of the same value as gold in London. Therefore, the gold to which plaintiff was entitled upon the redemption of his gold certificates had the value set forth in the petition herein.

It is the portion of the legislation and Executive Orders that attempts to disregard the actual market price of gold and to fix an arbitrary value much less than the market value, which, we contend, is the vice inherent in the whole of the legislation, as thereby the defendant herein seeks to repudiate its agreement and condemn property without payment of just compensation.

The figures above given establish that in the world market gold, on January 17, 1934, had a value of at least $33.43 an ounce and that the defendant itself was, on that date, through its agencies, purchasing gold not newly mined at $33.45 an ounce.

Defendant contends, however, that, by virtue of the Emergency Banking Act of March 9, 1933 and the Presidential Orders issued thereunder, plaintiff herein did not have the free right of disposal of his gold certificates or of the gold to which he was entitled upon his surrender thereof. Defendant states that the only action which he could have taken with reference to said gold or gold certificates was to deliver same to the Government and receive in exchange currency of the nominal value of $106,300, not redeemable in gold.

The consequences of upholding such a contention would, indeed, be far-reaching. During the war, the Government commandeered the total output of many factories manufacturing products needful for war purposes. Could it be successfully maintained that, if the Government had attempted to assert the right to fix the price which it would pay for the materials thus com-

mandeered, it could have upheld such action by stating that the factory could not lawfully have disposed of its produce to any other person and, therefore, the price offered by the Government was the sole price obtainable? The decision of this Court in *New River Collieries Co.* v. *United States*, 262 U. S. 341, 43 S. Ct. 565, answers this question in the negative.

We can easily visualize a situation under present conditions where the Congress might conceivably prohibit the sale of a stable article of commerce, like cotton, except to the United States Government. The Government might then state that it would pay 5c a pound for the cotton tendered to it. We are unable to believe that this Court would uphold such legislative and executive action as establishing the just compensation to be paid to the owners of such cotton by the defendant. The reduced value (assuming a market value in excess of 5c a pound) would result from the taking, and this Court has but recently held in a condemnation case:

> "But the value to be ascertained does not include, and the owner is not entitled to compensation for, any element resulting subsequently to or because of the taking." (*Olson* v. *United States*, 292 U. S. 246, 54 S. Ct. 704, 709.)

Simple justice requires that the converse to this proposition—that the owner is not obliged to suffer any loss resulting subsequently to or because of the taking—must be true.

We respectfully submit that the market value of gold on January 17, 1934, by the pleading and by outside proof, has been definitely fixed at not less than $33.43 an ounce. This finding necessarily establishes defend-

ant's legal liability to plaintiff for the additional sum demanded in the petition filed in the Court of Claims, for the reasons set forth in our main brief herein.

Respectfully submitted,

OTTO C. SOMMERICH,
Attorney for Plaintiff.

MAXWELL C. KATZ
OTTO C. SOMMERICH
RAYMOND T. HEILPERN
Of Counsel.